

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARVIN HARRIS,

Plaintiff,

v.

J. McCALL, et al.,

Defendants.

Case No.: C 14-0952 CW (PR)

ORDER OF SERVICE AND DIRECTING  
COURT CLERK TO PROVIDE  
PLAINTIFF WITH BLANK CIVIL  
RIGHTS FORM

INTRODUCTION

Plaintiff, a state prisoner incarcerated at Salinas Valley State Prison (SVSP), has filed a pro se civil rights action pursuant to 42 U.S.C. § 1983, alleging the violation of his constitutional rights by employees at SVSP.<sup>1</sup> His motion for leave to proceed in forma pauperis is granted in a separate order.

DISCUSSION

I. Legal Standard

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. Id.

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<sup>1</sup> This case was transferred from the Eastern District of California.

1 § 1915A(b)(1), (2). Pro se pleadings must be liberally construed.  
2 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
3 1988).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must  
5 allege two essential elements: (1) that a right secured by the  
6 Constitution or laws of the United States was violated, and  
7 (2) that the alleged violation was committed by a person acting  
8 under the color of state law. West v. Atkins, 487 U.S. 42, 48  
9 (1988).

10 Liability may be imposed on an individual defendant under 42  
11 U.S.C. § 1983 if the plaintiff can show that the defendant's  
12 actions both actually and proximately caused the deprivation of a  
13 federally protected right. Lemire v. Cal. Dept. Corrections &  
14 Rehabilitation, 726 F.3d 1062, 1074 (9th Cir. 2013); Leer v.  
15 Murphy, 844 F.2d 628, 634 (9th Cir. 1988); Harris v. City of  
16 Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981). A person deprives  
17 another of a constitutional right within the meaning of  
18 § 1983 if he does an affirmative act, participates in another's  
19 affirmative act or omits to perform an act which he is legally  
20 required to do, that causes the deprivation of which the plaintiff  
21 complains. Leer, 844 F.2d at 633. Under no circumstances is  
22 there respondeat superior liability under § 1983. Lemire, 726  
23 F.3d at 1074. Or, in layman's terms, under no circumstances is  
24 there liability under § 1983 solely because one is responsible for  
25 the actions or omissions of another. Taylor v. List, 880 F.2d  
26 1040, 1045 (9th Cir. 1989); Ybarra v. Reno Thunderbird Mobile Home  
27 Village, 723 F.2d 675, 680-81 (9th Cir. 1984). A supervisor may  
28 be liable under § 1983 upon a showing of (1) personal involvement  
in the constitutional deprivation or (2) a sufficient causal

1 connection between the supervisor's wrongful conduct and the  
2 constitutional violation. Henry A. v. Willden, 678 F.3d 991,  
3 1003-04 (9th Cir. 2012) (citing Starr v. Baca, 652 F.3d 1202, 1207  
4 (9th Cir. 2011)).

## 5 II. Plaintiff's Allegations

6 Plaintiff's sparse allegations state that Defendants C.  
7 Barela, J. McCall, P. Barnes and A. Partida retaliated against him  
8 for filing a lawsuit against staff by taking his legal and  
9 personal property from him and by deleting information from his  
10 criminal record. Plaintiff also states that, on January 10, 2014,  
11 Defendant McCall falsely accused him of burglary, oral copulation,  
12 petty theft, automobile theft, and assault on an inmate.

13 "Within the prison context, a viable claim of First Amendment  
14 retaliation entails five basic elements: (1) an assertion that a  
15 state actor took some adverse action against an inmate;  
16 (2) because of; (3) that prisoner's protected conduct, and that  
17 such action (4) chilled the inmate's exercise of his First  
18 Amendment rights, and (5) the action did not reasonably advance a  
19 legitimate correctional goal." Rhodes v. Robinson, 408 F.3d 559,  
20 567-68 (9th Cir. 2005) (footnote omitted). Prisoners may not be  
21 retaliated against for exercising their right of access to the  
22 courts. Schroeder v. McDonald, 55 F.3d 454, 461 (9th Cir. 1995).  
23 The right of access to the courts extends to established prison  
24 grievance procedures. Bradley v. Hall, 64 F.3d 1276, 1279 (9th  
25 Cir. 1995) overruled on other grounds by Shaw v. Murphy, 532 U.S.  
26 223, 230 n.2 (2001). Thus, a prisoner may not be retaliated  
27 against for using such procedures. Rhodes, 408 F.3d at 567.  
28

1       Liberally construed, Plaintiff's complaint alleges a First  
2 Amendment retaliation claim against the named Defendants.  
3 However, his allegation that McCall falsely accused him of  
4 committing various crimes does not state a cognizable claim.  
5 Plaintiff does not allege that McCall acted in retaliation for his  
6 filing lawsuits and calling someone names or lying about him is  
7 not a constitutional violation. See Cornejo v. County of San  
8 Diego, 504 F.3d 853, 855 n.3 (9th Cir. 2007) (stating that  
9 defamation, libel, and slander are state law causes of action);  
10 Freeman v. Arpaio, 125 F.3d 732, 738 (9th Cir. 1997) (recognizing  
11 that verbal harassment and abuse fail to state a claim cognizable  
12 under 42 U.S.C. § 1983), overruled in part on other grounds by  
13 Shakur v. Schriro, 514 F.3d 878, 884-85 (9th Cir. 2008).  
14 Therefore, this claim is dismissed. Dismissal is with leave to  
15 amend for Plaintiff to allege a constitutional violation, if he  
16 truthfully can do so.

#### 17 CONCLUSION

18       For the foregoing reasons, the Court orders as follows:

19       1. Plaintiff's claim based on allegations of verbal  
20 harassment is dismissed with leave to amend.

21       2. Within twenty-eight (28) days from the date of this  
22 Order, Plaintiff may file an amended complaint in order to cure  
23 the deficiencies noted above. Plaintiff shall use the court's  
24 civil rights complaint form, a copy of which is provided herewith,  
25 and include in the caption both the case number of this action,  
26 No. C 14-0952 CW (PR), and the heading "AMENDED COMPLAINT."

27       Because an amended complaint completely replaces the original  
28 complaint, Plaintiff must include in it all the claims he wishes

1 to present. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir.  
2 1992). Plaintiff may not incorporate material from the original  
3 complaint by reference. Failure to amend within the designated  
4 time will result in the dismissal of this claim; the First  
5 Amendment retaliation claim will proceed in accordance with the  
6 schedule set out below.

7 3. Plaintiff states a cognizable First Amendment retaliation  
8 claim against all the named Defendants.

9 4. In order to encourage the just, speedy and inexpensive  
10 determination of 42 U.S.C. § 1983 cases filed in this district,  
11 the parties may waive their right to proceed before a district  
12 judge and consent to proceed before a magistrate judge for all  
13 purposes. Attached to this Order is a Notice of Option to Consent  
14 to Proceed Before United States Magistrate Judge and an Order  
15 requiring the parties to notify the Court whether they consent or  
16 decline to so proceeding. The parties shall complete the  
17 requisite consent or declination form and return it to the Court  
18 no later than twenty-eight days from the date of this Order.

19 5. The Clerk of the Court shall mail a Notice of Lawsuit and  
20 Request for Waiver of Service of Summons, two copies of the Waiver  
21 of Service of Summons, a copy of the complaint (docket no. 1) and  
22 all attachments thereto, a copy of this Order, and a copy of the  
23 form "Consent or Declination to Magistrate Judge Jurisdiction" to  
24 SVSP employees J. McCall, C. Barela, P. Barnes and A. Partida.  
25 The Clerk shall also mail a copy of the complaint and a copy of  
26 this Order to the California Attorney General's Office.  
27 Additionally, the Clerk shall mail a copy of this Order to  
28 Plaintiff.

1       6. Defendants are cautioned that Rule 4 of the Federal Rules  
2 of Civil Procedure requires them to cooperate in saving  
3 unnecessary costs of service of the summons and complaint.  
4 Pursuant to Rule 4, if Defendants, after being notified of this  
5 action and asked by the Court, on behalf of Plaintiff, to waive  
6 service of the summons, fail to do so, they will be required to  
7 bear the cost of such service unless good cause be shown for the  
8 failure to sign and return the waiver forms. If service is  
9 waived, this action will proceed as if Defendants had been served  
10 on the date that the waiver is filed, except that pursuant to Rule  
11 12(a)(1)(B), Defendants will not be required to serve and file an  
12 answer before sixty days from the date on which the request for  
13 waiver was sent. (This allows a longer time to respond than would  
14 be required if formal service of summons is necessary.)

15       Defendants are advised to read the statement set forth at the  
16 foot of the waiver form that more completely describes the duties  
17 of the parties with regard to waiver of service of the summons.  
18 If service is waived after the date provided in the Notice but  
19 before Defendants have been personally served, the answer shall be  
20 due sixty days from the date on which the request for waiver was  
21 sent or twenty days from the date the waiver form is filed,  
22 whichever is later.

23       7. Defendants shall answer the complaint in accordance with  
24 the Federal Rules of Civil Procedure. The following briefing  
25 schedule shall govern dispositive motions in this action:

26       a. No later than thirty days from the date the answer  
27 is due, Defendants shall file a motion for summary judgment or  
28 other dispositive. If Defendants file a motion for summary  
judgment, it shall be supported by adequate factual documentation

1 and shall conform in all respects to Federal Rule of Civil  
2 Procedure 56. If Defendants are of the opinion that this case  
3 cannot be resolved by summary judgment, they shall so inform the  
4 Court prior to the date the summary judgment motion is due. All  
5 papers filed with the Court shall be promptly served on Plaintiff.

6 At the time of filing the motion for summary judgment or  
7 other dispositive motion, Defendants shall comply with the Ninth  
8 Circuit's decisions in Woods v. Carey, 684 F.3d 934 (9th Cir.  
9 2012), and Stratton v. Buck, 697 F.3d 1004 (9th Cir. 2012), and  
10 provide Plaintiff with notice of what is required of him to oppose  
11 a summary judgment motion or a motion to dismiss.

12 b. Plaintiff's opposition to the motion for summary  
13 judgment or other dispositive motion shall be filed with the Court  
14 and served on Defendants no later than twenty-eight days after the  
15 date on which Defendants' motion is filed.

16 Before filing his opposition, Plaintiff is advised to read  
17 the notice that will be provided to him by Defendants when the  
18 motion is filed, and Rule 56 of the Federal Rules of Civil  
19 Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (party  
20 opposing summary judgment must come forward with evidence showing  
21 triable issues of material fact on every essential element of his  
22 claim). Plaintiff is cautioned that because he bears the burden  
23 of proving his allegations in this case, he must be prepared to  
24 produce evidence in support of those allegations when he files his  
25 opposition to Defendants' summary judgment motion. Such evidence  
26 may include sworn declarations from himself and other witnesses to  
27 the incident, and copies of documents authenticated by sworn  
28 declaration. Plaintiff will not be able to avoid summary judgment  
simply by repeating the allegations of his complaint.

1 c. Defendants shall file a reply brief no later than  
2 fourteen days after the date Plaintiff's opposition is filed.

3 d. The motion shall be deemed submitted as of the date  
4 the reply brief is due. No hearing will be held on the motion  
5 unless the Court so orders at a later date.

6 8. Discovery may be taken in this action in accordance with  
7 the Federal Rules of Civil Procedure.

8 9. All communications by Plaintiff with the Court must be  
9 served on Defendants, or Defendants' counsel once counsel has been  
10 designated, by mailing a true copy of the document to Defendants  
11 or Defendants' counsel.

12 10. It is Plaintiff's responsibility to prosecute this case.  
13 Plaintiff must keep the Court informed of any change of address by  
14 filing a separate paper with the Clerk headed "Notice of Change of  
15 Address," and must comply with the Court's orders in a timely  
16 fashion. Failure to do so may result in the dismissal of this  
17 action for failure to prosecute pursuant to Federal Rule of Civil  
18 Procedure 41(b).

19 11. Extensions of time are not favored, though reasonable  
20 extensions will be granted. Any motion for an extension of time  
21 must be filed no later than fourteen days prior to the deadline  
22 sought to be extended.

23 12. The Clerk of the Court shall provide Plaintiff with a  
24 blank civil rights complaint form.

25 IT IS SO ORDERED.

26 Dated: 4/4/2014

27   
28 CLAUDIA WILKEN  
UNITED STATES DISTRICT JUDGE